

## REMARKS

Claims 1-11, 14, 17-21, 23-25, 28, 30-35, 44, 45, and 69-84 are pending in the case. Claims 1, 6, 19-21, 31-34, and 79-80 are presently amended, and claims 14, 17-18, 28, 30, 35, 44-45, 75-77, and 81-84 are cancelled without prejudice. All the claims are shown in the previous section. Applicants submit that the amendments do not introduce new matter.

### Specifically:

Claims 1 and 6 are amended to add the term “isolated” to refer to the claimed protein. This amendment is supported by, for example, page 11, lines 21-24 of Applicants’ specification;

Claims 1 and 6 are amended to add the phrase “at least about 95% sequence identity” when referring to the described sequences, and to add the respective functional language for those same sequences.

This amendment is supported by, for example, page 18, line 39 through page 19, line 2, and page 15, lines 27-29 respectively.

Claims 19-21, and 79-80 are amended to re-insert the phrase “at least”.

This amendment is supported at least by the claims as originally filed, and, for example, page 18, line 39 through page 19, line 2, and page 23, lines 12-19.

Claims 31, 32, and 34 are amended to change their dependency from cancelled claim 30 to claim 74. Claim 33 is amended to reflect the dependency change in claim 32.

## Sequence Compliance

The Examiner requests an explanation as to why a sequence listing was filed on September 6, 2005, and whether there is any difference between that sequence listing and the one filed on January 8, 2002. The September 6, 2005 sequence listing was resubmitted to ensure that a correct copy of the sequence listing was recorded for the present application. The September 6, 2005 sequence listing and the January 8, 2002 sequence listing are identical.

### **Claim Rejections - 35 U.S.C. § 101**

#### **Rejection of Claims 1-9, 14, 17-21, 23-25, and 69-78**

The Examiner rejects claims 1-9, 14, 17-21, 23-25, and 69-78 as directed to non-statutory subject matter. Claims 14, 17-18, and 75-77 are cancelled thus mooting the objection to those claims. As to the remaining claims, Applicants respectfully request withdrawal of the rejection. As the Examiner suggested, Applicants hereby amend independent claims 1 and 6 to recite “a composition comprising an isolated protein...”. Thus, these amended claims and claims which depend directly or indirectly from them are now directed to statutory subject matter.

### **Claim Rejections - 35 U.S.C. § 112**

#### **Rejection of Claims 1-5, 9, 14, 17-21, 28, 30-35, 44-45, 75, and 79-80**

The Examiner rejects claims 1-5, 9, 14, 17-21, 28, 30-35, 44-45, 75, and 79-80 under 35 U.S.C. § 112, first paragraph. The Examiner asserts that these claims contain subject matter not described in the specification in such a manner as to reasonably convey to one skilled in the art that the inventor had possession of the claimed invention at the time the application was filed. Specifically, the Examiner argues that “new matter” was introduced into the claims by the use of either “about 95% identity” or “about 98% identity”. Claims 14, 17-18, 28, 30, 35, 44-45, and 75 are cancelled thus mooting the rejection to those claims. As to the remaining claims, Applicants respectfully disagree.

The Examiner indicates that “about 95%” and “about 98%” identity are not explicitly supported by the specification. We have carefully considered the Examiner’s comments and believe that by adding back the phrase “at least” to modify the percent identity of a claim, the Examiner’s concerns are addressed. The phrase “at least” in plain language means “not less than”. Thus, when the description points out a percent identity of “at least about 90%”, the plain language interpretation means “not less than 90%”. In other words, “at least about 90%” is the same as anything above and about 90%. The drafter of the patent application could have said “about 90%, or about 91%, or about 92%, or about 93%, or about 94%, or about 95% ...” but it’s a common form of the English language to say “at least about 90%” as an efficient way of describing the same thing. Applicants have further provided means of determining percent identity, described at least on page 11, lines 15-19, page 18, line 39 through page 19, line 2, and page 23, lines 12-19, including useful software programs and references which describe the

parameters and algorithms. Thus, at least about 95% and/or at least about 98% are not “new matter” in relation to “at least about 90%”.

The Examiner points out that the previous response did not explain how the facts of *In re Wertheim* apply to the instant case. In *In re Wertheim*, the original specification described a range of 25% to 60%. When a new claim was added directed to “at least 35%”, the phrase “at least” was properly interpreted as having no upper limit (in other words, at least 35% included 35% and any percentage above 35%). Because the specification described a range of 25% to 60%, any percentage above 60% was not supported by the description. In the present case, Applicants have described the percent identity as “at least about 90%”. By the interpretation dictated in *In re Wertheim*, “at least about 90%” includes every percentage from about 90% to 100%, for example, about 95% and about 98%. Thus, for at least these reasons, “about 95%” and “about 98%” are not “new matter” in relation to “at least about 90%”.

Rejection of Claims 1-6, 14, 17-21, 23-25, 28-35, 44-45, 69-75, 79, 81, and 84 under 35 U.S.C. § 112, First Paragraph and Rejection of Claims 1, 5, and 6 under 35 U.S.C. § 112, First Paragraph

Applicants thank Examiner Rao for his time in the telephonic interview on January 29, 2007. Applicants have amended their claims according to Examiner Rao’s suggestions, and believe that the claims as amended overcome the remaining § 112 rejections.

Rejection of Claims 81-84

The Examiner rejects claims 81-84 under 35 U.S.C. § 112, first paragraph, asserting that they contain subject matter not described in the specification in such a manner as to reasonably convey to one skilled in the art that the inventor had possession of the claimed invention at the time the application was filed. These claims are cancelled herein, thus mooted the rejection.

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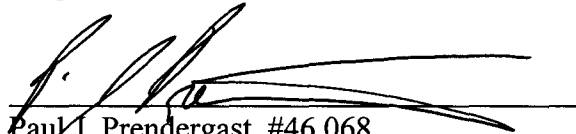
For the reasons set forth above, Applicant respectfully submits the claims as filed are allowable over the art of record and reconsideration and issuance of a notice of allowance are respectfully requested. If it would be helpful to obtain favorable consideration of this case, the Examiner is encouraged to call and discuss this case with the undersigned.

This constitutes a request for any needed extension of time and an authorization to charge all fees therefor to deposit account No. 19-5117, if not otherwise specifically requested. The

undersigned hereby authorizes the charge of any fees created by the filing of this document or any deficiency of fees submitted herewith to deposit account No. 19-5117.

Respectfully submitted,

Dated: 2/8/07

  
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